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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DANIEL and  
ROSEMARY R. HILLMAN.

DANIEL HILLMAN,

Appellant,

v.

ROSEMARY R. HILLMAN,

Respondent.

G040712

(Super. Ct. No. 04D011462)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Josephine Staton Tucker, Judge. Affirmed.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

The Western State University, College of Law, Civil Practice Clinic, and Terence W. Roberts for Respondent.

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In this marriage dissolution case, the court found that a document signed by Daniel Hillman effected a transmutation of his separate property to community property. The court also found he breached his fiduciary duty to his wife with respect to their community property residence and consequently awarded her reimbursement from another community asset. On appeal, Daniel contends both of these findings were erroneous and require reversal. We affirm.

### FACTS

Rosemary and Daniel Hillman were married in May 1990 and separated in October 2004. Judgment dissolving the marriage was entered in August 2007, and the division of property and spousal support was tried in September 2007.

The parties owned a residence and two unimproved lots, all of which were purchased during the marriage and were community property. The bank foreclosed on the residence in December 2004, shortly after the couple separated. The parties stipulated that Rosemary had contributed \$40,000 from an inheritance to purchase the residence.

Daniel testified “at some point” during the marriage Rosemary inherited \$278,000 from her mother, all of which was deposited in their joint checking account. They discussed “if she wanted to keep that money in the investment account and, you know, give it to her kids, that that would be fine. If she chose not to, then that’s okay, but I left that decision up to her.” The funds were dissipated before the parties separated.

Daniel testified he typically paid the bills each month during the marriage. During the last 18 months of the marriage, he stopped making the mortgage payments. Several default notices were sent to both him and Rosemary. Daniel tried to get refinancing for the house but was unsuccessful. He was involved in litigation with the Catholic Diocese of Los Angeles based on a tort that occurred before the marriage. He expected to receive “anywhere between 500,000 and 3 million [dollars]” in settlement and had received \$90,000 in advances on that expectation from Law Cash.

Daniel testified he and Rosemary “had reached a point that we knew a divorce was imminent, so what we agreed to was that I would make a proposal and she would make a proposal. Then we would put the two documents together and try to come to an agreement.” He gave Rosemary a document (the Document) consisting of two pages, handwritten by him, that listed the items she would keep when they separated. One of the items was a “[d]ocument from my attorney that gives you 50% of my church award up to a maximum of \$250,000.” The Document was signed and dated by Daniel. Daniel testified that Rosemary rejected the proposal, and he rescinded it in writing.

Rosemary testified that Daniel returned from a business trip in September 2004 and handed her the Document, saying his attorney told him to give it to her. This was the first she had learned that he wanted to leave the marriage. Rosemary gave the Document and her jewelry to her friends and asked them to hold them for her. Daniel never asked for the Document back, nor did he revoke it.

The next month, Rosemary “was coming down the stairs to go into the kitchen, and when I walked by the room that he was staying in he went, ‘bang-bang’ with gun-like fingers, and I went upstairs, and I thought for awhile what to do, and I decided to call 911.” The police came to investigate and discovered there were arrest warrants out on Daniel for “writing bad checks and I.D. theft.” He was taken into custody, where he remained for about 60 hours. He never returned to the house.

Rosemary testified her mother died in 1996. Her initial share of the inheritance was \$278,000. At first, she put it in an investment account. But Daniel told her, “‘I would never do that to you if I had received money. I’d share my money with you[.] . . . I could invest it better than [the investment account].” She retrieved the money from the investment account and signed it over to Daniel to deposit in a joint account. In addition to the initial amount, more inheritance money came to her over a two-year period. “[T]here was money coming from life insurance and things that my mother invested that we didn’t even know that she invested in that were coming in . . . later, years later.” Rosemary

gave each of her daughters \$15,000 for college and bought a baby grand piano for \$8,000. The rest of the money went into the parties' joint account.

Rosemary testified Daniel handled the bills during their marriage. Whenever she asked him about the finances, he said, "Everything was okay, not to worry." She never received any mail from creditors and first learned they had financial troubles "when [Daniel] went to jail. That's when I started going through the desk looking for who to call, whatever to do, and I came across the certified letters of the foreclosure, and I came across multiple credit cards that he had gotten in my name with his signature on them."

The court ruled that Daniel "breached his fiduciary duties with regard to the management of the payments on the [community residence.] [Daniel] failed to properly inform [Rosemary] of the circumstances that he and [she] were in and failed to give her the opportunity to remedy that." Accordingly, the court found Rosemary was entitled to be reimbursed for the \$40,000 separate property contribution she made to the community residence. The court also found that the Document "satisfies the requirements of Section 852 of the Family Code and therefore is a valid transmutation." The court ordered that the two unimproved lots "are to be placed on the market for sale forthwith. . . . Upon sale of the properties, [Rosemary] shall receive the first \$40,000 of the net proceeds and the remaining proceeds, if any, shall be divided equally between the parties. [¶] . . . [Rosemary] is awarded one-half of any award received by [Daniel's] settlement from the Los Angeles Catholic Archdiocese up to a maximum of \$250,000 . . . ."

#### DISCUSSION

Daniel contends the Document was merely a settlement proposal, not a transmutation, and because Rosemary ignored the proposal, it expired within "a reasonable time." (Civ. Code, § 1587, subd. (2).) He points to his testimony that the parties knew a divorce was imminent and agreed to exchange proposals for the division of their property.

The trial court believed Rosemary's version of events, not Daniel's. We will uphold a trial court's finding of fact if it is supported by substantial evidence,

notwithstanding the existence of evidence to the contrary. (*City and County of San Francisco v. Golden Gate Heights Investments* (1993) 14 Cal.App.4th 1203, 1211.)

Rosemary testified she had no idea that Daniel was considering divorce when he handed her the Document; he never asked her to return the Document nor did he rescind it. This evidence is sufficient to support the trial court's implied finding that the Document was not a settlement proposal.

The trial court found the Document operated to transmute one-half of Daniel's separate property settlement to Rosemary's separate property. The law allows one spouse to transmute his separate property to the separate property of the other spouse. (Fam. Code, § 850, subd. (c).) To be valid, a transmutation must be "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (Fam. Code, § 852, subd. (a).) Daniel argues the Document did not contain an "express declaration" as required by the statute. We disagree.

Family Code section 852 was adopted by the Legislature in 1984 to "increase certainty as to whether a transmutation had in fact occurred. . . . [¶] [S]ection 852 blocks efforts to transmute marital property based on evidence – oral, behavioral, or documentary – that is easily manipulated and unreliable. . . . [T]he writing must reflect a transmutation on its face, and must eliminate the need to consider other evidence in divining this intent." (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1106-1107.) A valid transmutation "necessitates not only a writing, but a special kind of writing, i.e., one in which the adversely affected spouse expresses a clear understanding that the document changes the character or ownership of specific property." (*Id.* at p. 1107.)

Here, the Document stated Rosemary was to have a "document from my attorney that gives you 50% of my church award up to a maximum of \$250,000." This expresses Daniel's clear understanding that he was giving a designated amount of his separate property to Rosemary in light of his desire to dissolve his marriage to her, thereby transmuting it to her separate property.

Daniel points out that a transmutation which advantages one spouse is presumed to be a product of undue influence. He argues Rosemary had the burden to rebut the presumption and she failed to do so. We disagree.

Family Code section 721, subdivision (b) provides: “[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.” If spouses enter into an agreement whereby one gains an unfair advantage over the other, “the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence.” (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27. See also *in re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 730.)

Here, Rosemary did not obtain the agreement to give her 50 percent of the church settlement; her testimony was that Daniel voluntarily and without prior discussion presented her with the Document when he indicated his desire to dissolve their marriage. If a presumption of undue influence arose, Rosemary rebutted it by her testimony that she did nothing to induce the gift.

Daniel also attacks the court’s order that the unimproved lots are to be sold and \$40,000 is to be reimbursed to Rosemary before the proceeds are divided. He argues the reimbursement for Rosemary’s separate property contribution to the community residence must be limited to that specific asset and cannot be made from unrelated property.

In support of his argument, Daniel cites Family Code section 2640, subdivision (b), which provides: “In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party’s contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed

shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.” Thus, Daniel argues, because the community property residence has been lost to foreclosure and has no value, Rosemary’s right of reimbursement is also lost.

Daniel’s argument misses the mark. The court ordered reimbursement of Rosemary’s separate property contribution to the community residence as a remedy for Daniel’s breach of his fiduciary duty with respect to that community asset. A court has discretion to effect an unequal division of the community property to remedy such a breach. “As an additional award or offset against existing property, the court may award, from a party’s share, the amount the court determines to have been deliberately misappropriated by the party to the exclusion of the interest of the other party in the community estate.” (Fam. Code, § 2602.)

#### DISPOSITION

The judgment is affirmed. Rosemary is entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.